IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1117 of 1985

For Approval and Signature:

Hon'ble MR.JUSTICE KSHITIJ R.VYAS
and
Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgement? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

STATE OF GUJARAT

Versus

SHANKARBHAI ZAVERBHAI

Appearance:

1. Criminal Appeal No. 1117 of 1985

MR MA BUKHARI, ld.APP for appellant

MS BANNA S DUTTA for Respondents

CORAM : MR.JUSTICE KSHITIJ R.VYAS
and
MR.JUSTICE K.M.MEHTA

Date of decision: 07/08/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE KSHITIJ R.VYAS)

The State of Gujarat, in this appeal, has challenged the judgment and order dated 15.6.1985 passed by the learned Addl.Sessions Judge, Baroda, in Sessions Case No.141 of 1984, acquitting the respondents-accused for the offences under Sec.302 and 323 read with Sec.34 of the Indian Penal Code.

2. The incident in question has taken place on 9.6.1984 at about 3.30 p.m. at village Oradi when a quarrel between the informant Abhesing and Accused No.2 Govind Zaver for tethering his cattle in the cattle shed had taken place. As per the prosecution case, informant Abhesing picked up quarrel with Accused No.2 and at that time, Accused No.2 gave a stick blow to the informant on his head, dorsal aspect of left hand and also on the left shoulder. Seeing this, deceased Natwarbhai who was sleeping in the cattle shed came running there and Accused No.1 Shankar Zaver gave blow with the blunt portion of shovel on the head of the deceased. Accused No.3 Arvind Shankar and Accused No.4 Shana Shankar gave stick blows to deceased Natwarbhai. When the deceased was about to get up, Accused No.2 Govind Zaver gave stick blow on his leg. Natwarbhai and Abhesing were taken in a bullock cart to Dabhoi Hospital where they were given medical treatment. Deceased Natwarbhai was later on shifted to SSG Hospital, Baroda where he died while undergoing treatment. Abhesing thereafter gave complaint at Dabhoi Police Station which was registered as I.CR No.170/84 for the offences under Sec.302 and 323 read with Sec.34 of the Indian Penal Code.

The investigation was thereafter conducted by PSI Mr.Soni. After completing the usual investigation, he submitted a chargesheet before the learned Judicial Magistrate, First Class, Dabhoi, who later on, committed the case for trial to the Court of Sessions, Baroda.

The Charge at Exh.3 was framed against the accused. The accused pleaded not guilty to the charge and claimed to be tried. The learned Addl.Sessions Judge, after appreciating the oral as well as documentary evidence, including the further statement of the accused recorded under Sec.313 of the Cr.PC was of the view that the prosecution, in the instant case, has failed to establish the charge levelled against the accused and therefore, acquitted all the accused of the offences charged against them. Hence the present appeal.

3. Mr.M.A.Bukhari, learned APP, after having taken

us through the evidence on record, submitted that the prosecution has proved the case against all the accused beyond reasonable doubt. He submitted that deceased Natwarbhai has not provoked or instigated and even then he has been killed. He, therefore, submitted that all the accused had a common intention to kill deceased Natwarbhai. He submitted that the prosecution has established the case beyond reasonable doubt by examining informant-Abhesing, PW6, Gambhir, PW7, Manilal, PW8 and the medical evidence on record also supports the say of the eye witnesses. He, therefore, submitted that the appeal is required to be allowed by setting aside the order of acquittal passed by the trial Court.

Learned Counsel for the respondents-accused, on the other hand, supported the judgment of the trial Court in toto.

4. In order to bring home the charge, the prosecution has mainly placed reliance on the evidence of informant, Abhesing, PW6-Exh.27, Gambhir, PW7-Exh.28, Manilal, PW8-Exh.29 and Bhailal, PW10-Exh.31. It may be stated that PW10 has not supported the prosecution and was declared hostile. Abhesing, PW6- informant is an injured witness. As per the medical certificate at Exh.17 issued by Dr.Sumanbhai, Medical Officer, Dabhoi Referral Hospital, the following injuries were found by him on the person of Abhesing:

(1) CLW over frontal region of scalp 7 cm x 1 cm x skin deep.

(2) CLW over Lt. eye brow 2 cm x 1/2 cm x skin deep.

(3) CLW "V" shaped over nosal bridge 1 cm x 1 cm x skin deep.

(4) Abrasion over Lt. wrist joint at dorsal aspect 1 cm x 1.5 cm.

(5) Abrasion on Rt. anterior superior iliac spine 1 cm x 1.5 cm.

(6) Wheel mark on upper part of Lt. scapula 3 cm x 1 cm.

(7) Wheel mark on upper part of Lt. scapula 3 cm x 1 cm.

(8) Abrasion on dorsal aspect of Rt.index finger.

(9) Abrasion on dorsal aspect of Rt. middle finger 1 cm x 0.5 cm.

In the opinion of the Dr.Sumanbhai, these injuries can be caused by stick. The said Doctor has also examined deceased Natwarbhai at 4.15 p.m. and found the following injury:

(1) CLW on Lt. parietal region of scalp 1 cm x 0.5 cm x skin deep.

He has issued medical certificate at Exh.16. In the opinion of the Doctor, this injury can be caused with the handle of the shovel or the blunt portion of the shovel.

It may be stated that on the day of the incident in question, at about 8.45 a.m. Accused No.2 Govind Zaver had gone with police yadi to Dr.Sumanbhai. The Doctor noticed the following injuries on the person of Accused No.2:

(1) CLW on middle parietal region of scalp 3 cm x 0.5 cm x skin deep.

(2) Bruise on Lt.shoulder 7 cm x 5 cm.

The Doctor has opined that these injuries can be caused by hard and blunt substance like stick and if no complication arises, it can be cured in eight days. He has issued the medical certificate at Exh.18. As far as the injuries on the person of Accused No.2 are concerned, Dr.Sumanbhai has admitted that the injuries caused to Accused No.2 may be with muddamal Article No.5, which is a stick, and if the blow is given with force, there is possibility of fracture and if such fracture is caused on the head and if there are internal injuries to the head, then it may also result into death.

Dr.P.H.Baria, Exh.21, who performed the post mortem of deceased Natwarbhai on 10.6.1984 has noticed contusion over the right scrotum about 3 cm in diameter and CLW over left parietal region 2 cm x 0.5 cm x 3 cm. According to Dr.Baria, the internal injuries were as mentioned in column 19. Scapular haemorrhage about 150 cc, fracture of left parietal bone "V" shaped, one wing 6 cm long and another wing 7 cm long with extensive subdural haemorrhage and sub arachnoid haemorrhage. According to the Doctor, the cause of death is due to

sub-dural and sub arachnoid haemorrhage due to injuries. According to Dr.Baria, all the above injuries were ante-mortem and the internal injuries were corresponding to and as a result of the external injuries which can be caused with any hard and blunt rough surface substance when blow is given with the said muddamal Article No.2 shovel and the injury mentioned in column No.15 can be caused with hard and blunt substance such as stick. In the opinion of the Doctor, the injury caused on the head was sufficient to cause death in the ordinary course nature.

5. From the medical evidence on record, it is clear that deceased Natwarbhai died an unnatural homicidal death. It is also clear that informant Abhesing as well as Accused No.2 Govind Zaver also sustained injuries.

6. It is not in dispute that all PWs Nos.6, 7, and 8 are related to each other. Accused Nos.1 and 2 are the real brothers while Accused Nos.3 and 4 are the sons of Accused No.1. Deceased Natwarbhai is the nephew of Accused No.1. PW6-Abhesing and PW7-Gambhir are the brothers of Accused Nos.1 and 2, while PW8 Manilal is the brother of deceased Natwarbhai. It is the consistent say of all these witnesses that the incident occurred at 3.00 p.m. on the day in question. It is their say that in their cattle shed, Accused No.2 was trying to tether his cattle. So PW6 told Accused No.2 not to do so as he was spoiling his "Juwar Kadap". Accused No.2 got annoyed and gave a stick blow on the head of PW6. The subsequent blows were given on the head, left hand, dorsal part and on the shoulder of PW6. PW6 shouted for help and so his nephew, deceased Natwarbhai, who was sleeping in the cattle shed came there running, and at that time, Accused No.1 came and gave a blow with the blunt portion of the shovel on his head. Accused Nos.3 and 4 also gave stick blows to the deceased after he fell down and when the deceased was about to get up, Accused No.2 gave stick blows on his both legs. Thereafter all the accused fled. Natwarbhai was taken to Dabhoi Hospital by Hamirbhai Manilal and Abhesing. The Medical Officer, Dabhoi, Dr.Sumanbhai examined deceased Natwarbhai and as he was in a serious condition, he transferred him to SSG Hospital, Baroda, where he died at about 9.00 p.m. during medical treatment.

7. All the PWs have been cross examined and the defence has tried to bring out the major contradictions in their evidence which will be referred at later stage.

On going through the evidence of all the eye

witnesses even though they have tried to involve all the accused in the commission of the offence, it appears to us that the PWs are trying to suppress the real incident. After carefully examined the evidence of PWs, it is clear that none of the witnesses has stated about the injuries sustained by Accused No.2 Govind Zaver including an injury which is a CLW on the middle parietal region of the scalp being 3 cm x 0.5 cm x skin deep injury, not a superfluous injury and quite serious in nature. Dr.Sumanbhai has noticed the said injury on the person of Accused No.2 when he was brought before him with police yadi. Since none of the PWs has referred to or explained about the injuries sustained by Accused No.2, a serious doubt arises about their version regarding the genesis of the incident.

Likewise, a serious doubt arises regarding the timings of the incident. It is the consistent say of the PWs that the incident has taken place in the cattle shed at about 3.30 p.m. on the day in question. Abhesing -PW6, in his evidence, has stated that he and others had gone with Natwarbhai in a bullock cart through Chandwada way to Dabhoi which requires about two hours from Chandwada and it takes 20 to 30 minutes to go from village Oradi to Chandwada, if one goes by bullock cart. Head Constable Kalubhai of Dabhoi Police Station had given yadi at Exh.19 at 3.45 p.m. for the purpose of giving medical treatment to Abhesing. This would go to show that the incident has not occurred at 3.30 p.m. as stated by all the PWs of the same family. The yadi at Exh.19 clearly discloses the occurrence of cognizable offence, however, the same is not treated as FIR. In our opinion, Exh.19 clearly changes the whole timings of the occurrence of the incident. All the PWs have narrated identical story in a parrot-like manner involving all the accused in the commission of the offence. However, the circumstances referred to above clearly suggest that they are concealing something which is very material for the purpose of the present case.

To elaborate the discussion as to what should be treated as FIR, in the instant case, we have to point out the evidence of PW5 - Madhu Sakharam, Duty Head Constable at SSG Hospital, Baroda has stated in his evidence that on 9.6.1984, he was on duty and at 9.30 p.m., he received the message from Dr.C.L.Vyas, PW3, Medical Officer, SSG Hospital, Baroda, that Natwarbhai's dead body was brought. According to him, along with the dead body, PW7- Gambhir had come and Gambhir had narrated all the facts and he has recorded the same which is produced at Exh.26. He, therefore, immediately sent a telephone

message to the control room and from the control room, the message was sent to the PSO, Dabhoi Police Station and the PSO Raisinh registered the crime being Dabhoi Police Station I-CR No.170 of 1984. Dr.Vyas, in his cross examination has specifically stated that he told Madhu Sakharam only that dead body of Natwarbhai was received whereas according to Kalubhai, Head Constable of Dabhoi Police Station, on 9.6.1984 at about 3.45 p.m., Abhesing had come to the police station and has further stated that there was a quarrel between himself and Govind Zaver and in the quarrel, his brother Natwarbhai was given a blow with shovel and Natwarbhai was sitting in the dispensary. If that is so, Head Constable Kalubhai could have reduced into writing whatever information is given by Abhesing as it clearly discloses the commission of cognizable offence. Having not done so and simply giving a yadi, at Exh.19 to Abhesing and Natwarbhai for their treatment and thereafter Natwarbhai was referred to SSG Hospital where he died at about 9.00 p.m., would be sufficient for us to be treated as an FIR which is in first point of time. Under the circumstances, suspicion arises that the prosecution is concealing something which is very material in as much as the so-called information in the statements of the witnesses recorded by the PSI is completely an after thought and they are arranged statements.

As observed earlier, there are material contradictions in the evidence of all the PWs. All the witnesses, in their evidence have stated that one blow with the blunt portion of the shovel was given whereas before the police, they have stated that three blows were given. These contradictions have been proved through PSI Soni. None of the witnesses has stated that they had seen any injury on the head of Accused No.2-Abhesing whereas Accused No.2 has been injured as per the medical evidence at Exh.18.

8. Thus, considering the evidence of all PWs who are family members, it appears that they are highly interested witnesses. Their evidence is not trustworthy, credible or reliable. It has come in evidence that there are number of houses adjoining the scene of offence and upon hearing the quarrels of Abhesing and Accused No.2 Govind, many persons of the neighbouring houses had collected there and had seen the incident. The prosecution, for the reasons best known to it, has not recorded the statements of certain witnesses who are independent witnesses and have not been examined. In our opinion, in absence of independent witnesses, no conviction can be based simply relying upon the evidence

of the interested witnesses. Thus, taking the over all view of the matter, we are in total agreement with the reasoning and the ultimate conclusion reached by the learned trial Judge in acquitting the respondents-accused.

9. In the result, the appeal fails and is dismissed. The Bail Bonds shall stand cancelled.

(Kshitij R. Vyas, J.)

(Kamal M. Mehta, J.)

Sreeram.